IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

THE PEOPLE OF THE STATE OF ILLINOIS,
ex rel. FRANK PARKER,
Petitioner,

vs.

THOMAS J. O'BRIEN, Sheriff of Cook County,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

The Opinion of the Court Below

The Supreme Court of Illinois rendered no opinion nor was any announcement made or were any reasons stated in support of the refusal to issue the writ.

II.

Jurisdiction

Final judgment was entered in the Supreme Court on November 11, 1942, where the record remains, a certified transcript of which is filed herewith.

The Supreme Court of Illinois has original jurisdiction to award habeas corpus (*People* v. *Simon*, 284 Ill. 28) and such application was duly made by printed petition, a copy of which is incorporated in the record here (R. p. 4). It will be seen from said petition that your petitioner urged upon the State court that those rights guaranteed by the fourteenth amendment to the Federal constitution were denied him.

In a previous petition for habeas corpus the Illinois Supreme Court declined to issue the writ without opinion. Petitioner preserved and raised a Federal question there also, as is shown by the transcript of the record submitted herewith.

The State court refused to grant a hearing in the case at bar and it is assumed that the facts alleged in our petition were conceded, so therefore the questions presented are questions of law for this court (*B. & O.* v. *Burtch*, 263 U. S. 540, 543).

As is shown by the petition filed in the Supreme Court (R. p. 4), your petitioner had endeavored without success to secure relief from the trial court where his federal rights were asserted. The law of Illinois does not permit an appeal or writ of error in such cases, and your petitioner adopted the method approved by authority and instituted a new action in the Supreme Court.

Our respectful claim is that the highest court of our State has refused to recognize the rights of petitioner as a citizen of the United States which claimed protection of the federal constitution was properly raised.

So, in the case at bar, there can be no question but what there has been:

(1) A final judgment;

(2) The decision sought to be reviewed is by the highest court of the state in which decision could be had;

(3) The judgment was rendered in a "suit" involving a "case" or "controversy" involving the liberty of your petitioner;

(4) The case presents a substantial federal question;

(5) The federal question sought to be reviewed was properly raised and preserved in the state courts; and

(6) The decision of the highest court of the state does not rest upon a state ground which independently and adequately supports the judgment.

Statement of the Case

Reference is respectfully made to the "Summary Statement of the Matter Involved" in our petition (p. 2).

Errors to Be Urged

Reference is respectfully made to our petition under a similar heading (p. 3).

Questions Presented

Your petitioner started to serve his state court sentence pursuant to the order of the state court with the knowledge and consent of the Federal court and authorities. The Sheriff of Cook County, respondent herein, without authority, interrupted the sentence and turned your petitioner over to the United States Marshal. Long after the time of the said sentence had expired, the Sheriff locked up your petitioner claiming that he must serve out the time already served while your petitioner was imprisoned in the federal penitentiary. The questions presented are: Is your petitioner being compelled to serve his sentence twice and, if so, is he being deprived of a

substantial right guaranteed him by the fourteenth amendment?

Constitutional Provisions Involved

The fourteenth amendment to the constitution of the United States provides that:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

PROPOSITIONS OF LAW RELIED ON AND CITATION OF CASES

I.

The law is established in Illinois that a convict is imprisoned without due process of law and entitled to his release where it is made to appear that he is held in confinement after his sentence has expired.

People v. *Bowen,* 367 Ill. 589, 593.
People v. *Simon,* 284 Ill. 28.
People v. *Eller,* 323 Ill. 28.

II.

It must follow that where the facts are admitted and it appears that his sentence has expired the State, by refusing to inquire into the matter and to grant relief, has denied petitioner a fundamental right to due process as guaranteed by the fourteenth amendment.

III.

Supreme Court of Illinois has original jurisdiction to award habeas corpus.

People v. *Simon,* 284 Ill. 28.

IV.

Under clause 2 of section 22 of the Habeas Corpus act of Illinois a writ of habeas corpus will lie where, although the original imprisonment was lawful, yet by some subse-

quent act, omission or event the prisoner has become entitled to his discharge.

People v. *Mallary,* 195 Ill. 582.

V.

As to the right of a defendant to acknowledge judgment for a fine under section 16 of Division XIV of the Criminal Code of Illinois.

People v. *Horan,* 294 Ill. 314, 320.

VI.

The principle of *res adjudicata* is not applicable to proceedings in habeas corpus.

In re Ring, 28 Cal. 247.

Maria v. *Kirby,* 51 Ky. 542.

In re Snell, 31 Minn. 110, 16 N. W. 692.

In re Reynolds, 6 Parker Cr. R. 276.

Ex parte Rosson, 24 Tex. App. 226, 5 S. W. 666.

VII.

While there is some authority to the effect that sentences imposed by different courts run successively even though the later sentence does not so state, ordinarily, where a person under sentence for a crime is convicted and sentenced for another offense in a different court, the sentences run concurrently unless the judgment in one stipulates that imprisonment shall commence at the ex-

piration of imprisonment under the other conviction or a statute provides a different rule.

15 American Jurisprudence, p. 126, Criminal Law, Sec. 471, citing annotations in 5 A. L. R. 381, 53 A. L. R. 625, 7 L. R. A. (N. S.) 273.

Zerbst v. *Lyman* (C. C. A. 5th), 255 F. 609, 5 A. L. R. 377.

Dickerson v. *Perkins,* 182 Iowa 871, 166 N. W. 293, 5 A. L. R. 374.

VIII.

Two or more sentences of a defendant to the same place of confinement run concurrently in the absence of specific provisions in the judgments to the contrary, and where a defendant is already in custody in execution of a former sentence and the second sentence does not state that the period of imprisonment is to commence at the expiration of the former sentence the sentences will run concurrently in the absence of a statute providing for a different rule, notwithstanding the sentences are pronounced by different courts for different offenses.

People v. *Graydon,* 329 Ill. 398.

IX.

A *mittimus* is only a transcript of the minutes of the conviction and sentence duly certified by the clerk, and neither the clerk nor the sheriff has power to control the effect of the sentence of the court by changing the *mittimus* but they can only certify and execute, respectively, the sentence of the court as recorded, and where two writs out of different courts are issued the sheriff cannot execute one and withhold the other until after sentence

is served under the former, as it is clearly a judicial function to determine which sentence shall be served first and whether one shall succeed the other.

People v. *Graydon,* 329 Ill. 398.

X.

When a prisoner who has been legally and properly sentenced and is safely in the proper custody, there is no office for a mittimus to perform.

People v. *Thompson,* 358 Ill. 81, 89.

XI.

Our system of state and federal jurisdiction requires a spirit of reciprocal comity between courts to promote due and orderly procedure.

Ponzi v. *Fessenden,* 258 U. S. 254.

XII.

The Attorney General, in view of his statutory functions, has implied power to exercise the comity of the United States in such cases, provided enforcement of the sentence of the federal court be not prevented or the prisoner endangered.

Ponzi v. *Fessenden,* 258 U. S. 254, 255.

XIII.

Due process of law as guaranteed by the XIV amendment to the Federal constitution requires that petitioner be discharged.

Argument

May it please the Court:

At the outset permit us to say that we realize that the fourteenth amendment does not prevent a State from prescribing the mode and procedure in criminal prosecutions or the mode and extent of punishment. If the State court in the original sentence had ordered Parker to serve his jail sentence after he finished his Federal term we could not be heard to complain. Further, if the State courts had construed the judgment to mean such an order had been entered or implied, we would have no remedy here, even if the language of the sentence, in fact, excluded such construction. In other words, we hope to recognize and distinguish those cases in which the state courts have the final word. We alleged in our petition (R. p. 4) that the orders of the State court demonstrate that the trial judge intended and ordered that your petitioner serve his jail sentence prior to being removed to the Federal Penitentiary. This allegation, among others, must be held as admitted by the State Supreme Court. The State courts in the case at bar have refused to act, and we contend that a fundamental right of petitioner as a citizen of the United States is being infringed.

The law is established in Illinois that a convict is imprisoned without due process of law and entitled to his release where it is made to appear that he is held in confinement after his sentence has expired (*People* v. *Bowen*, 367 Ill. 589, 593; *People* v. *Simon*, 284 Ill. 28; *People* v. *Eller*, 323 Ill. 28). It must follow that where the facts are admitted and it appears that his sentence has expired

the State, by refusing to inquire into the matter and to grant relief, has denied petitioner a fundamental right to due process as guaranteed by the fourteenth amendment.

In the State of Illinois no appeal or writ of error is permitted in proceedings such as this (we do not complain of this). As is shown by the petition filed in the Supreme Court of Illinois, we endeavored to secure relief in the trial court. Failing that we applied, in the manner required, to the Supreme Court. We fully realize that if we had had a trial or hearing upon the issue presented we could not complain here. But we contend that the refusal on the part of the Supreme Court of Illinois to give us a hearing leads to the conclusion that the rights of petitioner were measured not by the general law but by rules made to affect petitioner individually. Due process as guaranteed by the fourteenth amendment should operate upon all alike, and not subject petitioner to the arbitrary exercise of the powers of government unrestrained by the established principles of right and justice (*Caldwell* v. *Texas*, 137 U. S. 697).

The Supreme Court of Illinois rendered no opinion, nor was any reason given for the judgment refusing the writ. Under our practice this action should be construed in the same manner as the sustaining of a demurrer. The facts alleged by us are taken as true. From such a position we argue that denial of relief can be nothing but an arbitrary disregard of due process as guaranteed not only by the constitution and laws of Illinois, but by the fourteenth amendment as claimed.

We contend that the right to the writ of habeas corpus was unlawfully suspended by the action of our Supreme Court. The Statute (R. S. Ch. 37 Courts Sec. 21) requires that opinions of our Supreme Court should be in writing,

and in the matter of the disposition of motions an oral announcement is often made containing the reasons given by the court in support of its decision. The absence of any opinion or announcement lends support to our claim that the fundamental right claimed was arbitrarily or inadvertently denied without support of fact or law. As is shown by the petition (R. p. 4), we applied previously for the writ without success and without any statement of reason. As successive writs are permitted under our practice we tried again, stating, with all due respect, that our Supreme Court must surely have misapprehended the law and the facts.

The petition (R. p. 4) shows that the original case was taken to the Supreme Court of Illinois and there affirmed (*People* v. *Moran*, 378 Ill. 461), and that this court denied certiorari (No. 1013, October Term, 1941). The point we now make was not made in the original proceeding nor could it have been raised (*Marx* v. *People*, 204 Ill. 248). Under clause 2 of section 22 of the Illinois Habeas Corpus act the writ lies to secure relief from an expired sentence. As was alleged in the petition (R. p. 4), petitioner did nothing to stay the running of his jail sentence until it had expired.

Habeas corpus will lie where the original detention was legal, but has become illegal by reason of matters *ex post facto*, as where a person is restrained of his liberty under a judgment of conviction containing a sentence which has been served (12 R. C. L., Habeas Corpus, sec. 29, p. 1210, citing *Northfoss* v. *Welch*, 116 Minn. 62, 133 N. W. 82, 36 L. R. A. (N. S.) 578, *State* v. *Wolfer*, 127 Minn. 102, 148 N. W. 896, L. R. A. 1915B 95).

So it will be seen that petitioner does not seek to use the writ of habeas corpus as a writ of error as did the prisoner in *Woolsey* v. *Best, Warden*, 299 U. S. 1.

Where denial of constitutional rights are shown this court will scrupulously review the record (*Avery* v. *Alabama,* 308 U. S. 444, 447, *Norris* v. *Alabama,* 294 U. S. 587, 590, *Pierre* v. *Louisiana,* 306 U. S. 358).

A petition for a writ of habeas corpus duly presented, is the institution of a cause on behalf of petitioner, and the allowance or refusal of process, as well as the subsequent disposition of the prisoner, is a matter of law and not of discretion (*Ex parte Milligan,* 4 Wallace, 2, 24).

We have in mind the well settled rule that the writ need not be awarded if it appear that upon the showing made by the petitioner, that if brought to court and the cause of his commitment inquired into he would be remanded to prison. (12 R. C. L., sec. 48, p. 1233.) The case at bar, we contend, does not present such a condition. It is more as if the Sheriff picked up petitioner after he had been discharged after having served his sentence. In such a case the refusal of the Supreme Court to issue the writ could not make the detention legal, nor could such refusal preclude relief here, the claim of federal rights having been properly urged and denied.

Although a writ of habeas corpus does not ordinarily reach the record (*Hyde* v. *Shine,* 199 U. S. 62), a writ of certiorari auxiliary to the writ was unnecessary in the Supreme Court of Illinois in view of the fact that the salient portions of the record were incorporated in the petition and filed as exhibits, which exhibits have been certified here (R. p. 9 to 16).

As was said in *Smith* v. *O'Grady,* 312 U. S. 329, 330, the judgment of the Illinois Supreme Court here is a final and authoritative answer to any contention that petitioner's imprisonment is illegal under the State's

constitution and laws. In that case, as here, the application was dismissed without requiring the State to answer and without giving petitioner an opportunity to prove his allegations. We quote (330):

> "But petitioner also contended that his imprisonment was illegal under the federal Constitution. And in denying the writ the Nebraska court necessarily held that petitioner's allegations—even if proven in their entirety—would not entitle him to habeas corpus, even if the petition showed a deprivation of federally protected rights. It was to review this question that we granted certiorari. 311 U. S. 633."

Then we find a quotation from *Mooney* v. *Holohan*, 294 U. S. 103, 113, as follows:

> "Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that Constitution."

This court concludes that (332):

> "It is therefore our duty to examine petitioner's allegations in order to determine whether they show that his imprisonment is the result of a deprivation of rights guaranteed him by the federal Constitution."

In the case at bar we do not attack the judgment as in *Smith* v. *O'Grady*, 312 U. S. 329, *Walker* v. *Johnston*, 312 U. S. 275, *Johnson* v. *Zerbst*, 304 U. S. 458, *Mooney* v. *Holohan*, 294 U. S. 103 and *Chambers* v. *Florida*, 309, but we submit that the reasoning applies here. Each case must be decided upon its facts.

Ordinarily the court first acquiring jurisdiction is permitted to keep the same until the matter is disposed of. As was held in *Ponzi* v. *Fessenden*, 258 U. S. 254, our system of state and federal jurisdiction requires a spirit of reciprocal comity between courts to promote due and orderly

procedure. In the case at bar the indictment in the State court was returned first, but the case in the Federal court was tried first. We contend that if the Marshal had taken your petitioner to the Federal Penitentiary before the State trial and then the Federal authorities had permitted the State officials to have your petitioner for trial, and the State court sentenced your petitioner and your petitioner was taken by the Sheriff to the jail to commence his sentence, then the Federal government would have had to wait for their prisoner until he served his State sentence. Or the Federal authorities would have had to apply to the State court for an order in the premises. In the absence of an order of court the Sheriff had no more right to turn your petitioner over to the Marshal than he had to take your petitioner to his home to work on the Sheriff's lawn.

As was said in *People* v. *Graydon,* 329 Ill. 398, 401:

> "To determine which sentence shall be served first and whether one shall succeed the other is clearly a judicial act, which neither the clerk nor sheriff has power to perform. The clerk can only certify to the order of the court and the sheriff can only execute the sentence of the court as recorded."

And now we contend that the Sheriff, having interrupted the sentence, has no more right to demand service of the remainder of the term than he would have if your petitioner had been working for nineteen months at the home of the Sheriff after the commencement of his sentence. The case supposed by us is stronger than the case at bar because the Marshal did not take your petitioner to the Federal Penitentiary but turned him over to the Sheriff. The Marshal in his return (Exhibit C, R. p. 16) states that this custody was temporary, but the facts stated in our petition (R. p. 4) and admitted show that it was not temporary and was for the purpose of the State trial. The con-

sent of the Marshal, and consequently of the Attorney Gen eral of the United States, to the State court jurisdiction is evident from his conduct. In the case cited, *Ponzi* v. *Fessenden,* 258 U. S. 254, Mr. Chief Justice Taft said (265):

> "But it is argued that when the prisoner is produced in the Superior Court, he is still in the custody and jurisdiction of the United States, and that the state court can not try one not within its jurisdiction. This is a refinement which if entertained would merely obstruct justice. The prisoner when produced in the Superior Court in compliance with its writ is personally present. He has full opportunity to make his defense exactly as if he were brought before the court by its own officer. *State* v. *Wilson,* 38 Conn. 126, 136. The trial court is given all the jurisdiction needed to try and hear him by the consent of the United States, which only insists on his being kept safely from escape or from danger under the eye and control of its officer. This arrangement of comity between the two governments works in no way to the prejudice of the prisoner or of either sovereignty."

It was held in that case that the Attorney General, in view of his statutory functions, has implied power to exercise the comity of the United States in such cases, provided enforcement of the sentence of the Federal court be not preventing or the prisoner endangered. The Marshal is the agent of the Attorney General in this regard and our petition alleges the fact to be that the State sentence was commenced with the knowledge and consent of the Attorney General.

The *Fessenden* case is cited in *Herbert* v. *Louisiana,* 272 U. S. 312, 315, from which we quote:

> "It, of course, was essential that the state court have jurisdiction of the persons of the accused. In fact they were before it and were accorded full opportunity to defend. In the absence of any showing to the contrary, and there is none, it properly may be

assumed that the United States acquiesced in their arrest and trial on the accusation under the state law, notwithstanding they were then on bail awaiting trial in the federal court on the indictment pending there. Certainly, if the United States was not objecting, the fact that the accused were thus on bail awaiting trial in the federal court presented no obstacle to the arrest under the process of the state court as a means of acquiring jurisdiction of their persons. *Ponzi* v. *Fessenden,* 258 U. S. 254, 260; *Beavers* v. *Haubert,* 198 U. S. 77, 85; *Peckham* v. *Henkel,* 216 U. S. 483, 486."

In *People* v. *Graydon,* 329 Ill. 398, it was held that two or more sentences of a defendant to the same place of confinement run concurrently in the absence of specific provisions in the judgments to the contrary, and where a defendant is already in custody in the execution of a former sentence and the second sentence does not state that the period of imprisonment is to commence at the expiration of the former sentence the sentences will run concurrently in the absence of a statute providing for a different rule, notwithstanding the sentences are pronounced by different courts for different offenses. And further that a *mittimus* is only a transcript of the minutes of the conviction and sentence duly certified by the clerk, and neither the clerk nor the sheriff has power to control the effect of the sentence of the court by changing the *mittimus* but they can only certify and execute, respectively, the sentence of the court as recorded, and where two writs out of different courts are issued the sheriff cannot execute one and withhold the other until after sentence is served under the former, as it is clearly a judicial function to determine which sentence shall be served first and whether one shall succeed the other.

In the *Thompson* case, 358 Ill. 81, 89, it was held that when a prisoner who has been legally and properly sen-

tenced and is safely in the proper custody, there is no office for a *mittimus* to perform.

In the case at bar the record shows (Exhibit B, R. p. 11) that your petitioner had obtained a stay of *mittimus* when the state judgment was entered. Then the record shows (R. p. 12) that the sureties surrendered him in open court and he started in to serve his State sentence. To make sure that there was nothing to prevent the running of his State court sentence, your petitioner moved for a vacation of the order staying the mittimus, which motion was allowed (R. p. 13). This order of vacation may not have been necessary as the *mittimus* was defunct, but this order entered after your petitioner was in custody shows plainly the intention of the State court to permit your petitioner to start the service of his State court sentence.

We contend that if the court was without power, surely the Sheriff and the Marshal cannot be permitted to alter and change the sentence. As was said in *Smith* v. *Swope*, 91 F. (2d) 260, 262:

> "The prisoner is entitled to serve his time promptly if such is the judgment imposed, and he must be deemed to be serving it from the date he is ordered to serve it and is in the custody of the marshal under the commitment, if, without his fault, the marshal neglects to place him in the proper custody. Any other holding would give the marshal, a ministerial officer, power more arbitrary and capricious than any known in the law. A prisoner sentenced for one year might thus be required to wait forty under the shadow of his unserved sentence before it pleases the marshal to incarcerate him. Such authority is not even granted to courts of justice, let alone their ministerial officers. Citation of authority is hardly needed to establish so elementary a proposition. *In re Jennings* (C. C.), 118 F. 479, 481; *Albori* v. *United States* (C. C. A. 9), 67 F. (2d) 4, 6. And see *White* v. *Pearlman* (C. C. A. 10), 42 F. (2d) 788, 789."

In the case at bar the situation is reversed, and it is the Sheriff who assumed the right to change the sentence to make it commence to run after the Federal sentence. The Sheriff in the case at bar seeks to assume the power of lending your petitioner out of his custody to serve a Federal sentence and then to compel your petitioner to return to jail and finish his interrupted sentence.

A leading case which is instructive in the present situation is that of *In re Jennings*, 118 Fed. 479. It appears that the marshal for the Northern District of the Indian Territory delivered Jennings to the marshal of the Southern District for a second trial and conviction. The delivery was made after a conviction in the Northern District. The defendant was discharged on *habeas corpus* after he served his time, counting from the date of the first judgment, although the officers tried to enforce consecutive sentences by delivering Jennings back to the first named District after he had served his second sentence. The Court said:

> "In view of the foregoing facts, it is obvious that the marshal for the Northern District of the Indian Territory acted without authority of law in surrendering the petitioner to the custody of the marshal of the Southern District of the Indian Territory after a judgment and sentence had been pronounced, committing him to prison in the United States penitentiary at Ft. Leavenworth for the term of five years for an assault with intent to kill. The judgment and sentence in question commanded the marshal to convey the prisoner to Ft. Leavenworth 'without delay, and deliver him to the custody of the keeper of said penitentiary.' From what source the marshal derived his authority to act differently, and to disobey the plain mandate of the court whose officer he was, is not disclosed; and such conduct on the part of a ministerial officer is so far subversive of judicial authority and at variance with the established course of judicial procedure as to warrant the belief that no authority or precedent can be found which would justify such

action. The law contemplates that after a prisoner has been tried and sentenced he will be committed at once to the custody of the prison officials where the sentence is to be executed. He passes by virtue of the sentence into a custody different from that of the court before which he was convicted. This doctrine is enforced so rigidly in some jurisdictions, and possibly in all, that, after a sentence for a crime has been pronounced, the prisoner cannot be arraigned and tried for another offense, even in the same court by which he was sentenced, until the sentence is reversed by a higher tribunal, or he has served out his term of imprisonment. Ex Parte Meyers, 44 Mo. 279, 281; *State* v. *Buck,* 120 Mo. 479, 496, 497, 25 S. W. 573, and cases there cited. If the marshal of the northern district of Indian Territory acted within the law in delivering the prisoner to the marshal of the southern district of the territory, then no reason is perceived why he might not as well have delivered him to any other federal marshal for trial in any other federal district within the United States, thereby postponing the execution of the first sentence indefinitely, or until he had been tried in a dozen different districts for as many different offenses. This view of the marshal's authority is too unreasonable to be adopted, and it is therefore rejected.

"As the marshal for the northern district of the Indian Territory acted illegally and without warrant of law in surrendering the prisoner to a custody other than that of the warden of the penitentiary at Ft. Leavenworth, the inquiry arises whether such wrongful conduct on the part of the officer suspended the operation of the sentence, and prevented it from expiring by lapse of time. This question, in my judgment, should be answered in the negative. So far as the petitioner is concerned, his rights were unaffected by the illegal act of the officer, and the case must be treated precisely as if the marshal had discharged his duty according to law, by committing the prisoner to the proper custody. If the marshal had performed his duty, the body of the petitioner would have been delivered without delay to the warden of the penitentiary at Ft. Leavenworth. The petitioner's term of

imprisonment would in that event have been computed from the date of his sentence, June 4, 1898, inasmuch as the execution of the sentence was not stayed by the appeal; and deducting the allowance in his favor for good behavior at the rate of two months per year, as prescribed by the federal statutes (26 Stat. 840, c. 529, sec. 8 (U. S. Comp. St. 1901, p. 3727), his term of imprisonment would have expired prior to the time when his application for the present writ was filed. In view of the circumstances of the case, it must be presumed, in favor of the prisoner, that he would have earned his allowance of time for good behavior. He has in fact been in actual custody, undergoing imprisonment since June 4, 1898,—a part of the time in a jail at Ardomore, in the Indian Territory, a part of the time in the penitentiary at Columbus, Ohio, and a small portion of the time in the federal penitentiary at Ft. Leavenworth. It matters not that during a portion of the time during which he has been confined he has been held ostensibly for an offense other than that for which he was originally convicted. In the eye of the law, he has all the time been serving out the sentence that was imposed on him for an assault with intent to kill, because no ministerial officer, by disobeying the mandate of the court, and unlawfully surrendering him into another custody than that where he rightfully belonged, could suspend the running of the sentence for that offense."

As was said by the Illinois Supreme Court in *People* v. *Graydon,* 329 Ill. 398, 402:

> "The punishment which the worst criminal has inflicted upon him must be legal, and when this is not so, however unintentional, an offense is being committed in the name of the law against the person."

We pray that the writ be issued and upon the hearing we hope to demonstrate that petitioner is entitled to his discharge. Petitioner not only served his year in the Federal penitentiary but, as stated in our petition (R. p. 4),

those authorities added to his term and deprived him of privileges because of the State conviction. Double jeopardy and repetitious punishment are repugnant not only to our law but to decency and fairness, as your Honors well know. We respectfully submit that such imprisonment is contrary to the law of the land and a denial of due process as protected by the Fourteenth Amendment.

Respectfully submitted,

WM. SCOTT STEWART,
Counsel for Petitioner.